Abdul Rahim Jemali v Merlin Management Corp Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R3-25-139-1994
ABDUL KADIR MUSA JC
6 APRIL 1996

Administrative Law *— Remedies — Certiorari and mandamus — Whether Industrial Court took into account irrelevant matters and failed to take into account relevant matters — Whether Industrial Court had committed error of law which went to its jurisdiction*

Labour Law *— Employment — Termination of employment — Dismissal — Constructive dismissal — Whether there was delay on the part of the employee to consider himself constructively dismissed — Whether delay and conduct of employee amounted to waiver of his rights*

The applicant applied for orders of certiorari and mandamus to quash in part the decision of the learned chairman of the Industrial Court pursuant to O 53 of the Rules of High Court 1980. The award of the Industrial Court showed that the court was satisfied that the applicant was constructively dismissed on 27 September 1989. The Industrial Court, however, further held that as the applicant did not react immediately to the action taken by the respondents but waited for 22 days before tendering his resignation in writing (CL4), by such delay, the applicant was deemed to have waived the breach and agreed the variation in his contract of employment. Before the High Court, it was agreed that there was constructive dismissal pursuant to s 20 of the Industrial Relations Act 1967 ('the Act') and that there was delay on the part of the applicant to consider himself so constructively dismissed. Among the issues for consideration were: (i) whether the said delay amounted to a waiver on the part of the applicant to accept the variation of the terms of his contract with the respondents; and (ii) whether the delay was reasonable and within justifiable grounds in the circumstances of the case. The court also had to consider whether the learned chairman had committed jurisdictional error on the general law of: (i) corroboration; and (ii) burden of proof.

Held, allowing the application:

(1) Although the general rule was that the decision of an Industrial Court based on factual inferences of established or undisputed facts fell squarely within the jurisdiction of that court and was not reviewable by the High Court by virtue of s 33B of the Act, such a decision could still be reviewed if the Industrial Court in making an award came to absurd conclusions or achieved the same absurdly (see p 428D–F); *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988]

3 MLJ 204, *Chan Siew Kim v Woi Fung Shen Tim Medical Store & Anor* [1978] 1 MLJ 144 and *Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 followed.

(2) If the decision of the learned chairman was an absurd one or was reached absurdly by taking into consideration what he should have omitted or failing to consider those that should not be ignored, that, in law, was tantamount to him committing an error of law. Such an error will therefore, where the circumstances justify, enable the court to issue certiorari and/or mandamus, as the case may be, notwithstanding the existence of the privative or ouster clause in s 33B of the Act (see pp 429H–430A); *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 followed.

(3) The irresistible conclusion to be inferred as to why it took the applicant 22 days to write CL4 and not earlier, was to make certain for a fact that he was being constructively dismissed by the respondents. It was only when the applicant was certain that the respondents were 'forcing' him out of the company by their or their agents' conduct that he wrote CL4. Any reasonable man applying a realistic and not irrational objective test would, in all probabilities, have come to the same decision as did the applicant, having regard to his position before 27 September 1989 (see p 433H–I).

(4) By holding that the applicant voluntarily resigned due to his own delay would certainly be 'irrational' and 'wrong in law' as being against the weight of evidence adduced in this application. The existence of such a clear error of law left no alternative but to issue the orders of certiorari and mandamus accordingly (see p 439A–B); *Chahaya Pemborong Sdn Bhd Sabah v Lee See Khong* [1990] 1 ILR 202, *Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1975] 2 MLJ 317 and *Hoh Kian Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 followed.

(5) There is no rule of law that a person must call one or more independent witness(es) to corroborate a fact which had been proved within the meaning of s 3 of the Evidence Act 1950 (see p 440B–C).

(6) Since the applicant had made the allegation that he was threatened by the manager of human resource and administration for the respondents, he had the burden of proving that particular fact (see p 440F–H).

[Bahasa Malaysia summary

Pemohon telah memohon untuk perintah-perintah certiorari dan mandamus untuk membatalkan sebahagian daripada keputusan pengerusi yang arif Mahkamah Perusahaan mengikut A 53 Kaedah-Kaedah Mahkamah Tinggi 1980. Award Mahkamah Perusahaan menunjukkan bahawa mahkamah berpuas hati bahawa pemohon

telah dipecat secara konstruktif pada 27 September 1989. Akan tetapi, Mahkamah Perusahaan seterusnya memutuskan bahawa memandangkan pemohon tidak bertindak serta merta kepada tindakan yang diambil oleh penentang tetapi menunggu selama 22 hari sebelum mengemukakan perletakan jawatan secara bertulis (CL4), dengan kelewatan tersebut, pemohon dianggap telah mengetepikan kemungkiran tersebut dan bersetuju kepada perubahan dalam kontrak pekerjaannya. Di hadapan Mahkamah Tinggi, telah dipersetujui bahawa terdapat pemecatan konstruktif mengikut s 20 Akta Perhubungan Perusahaan 1967 ('Akta tersebut') dan terdapat kelewatan oleh pemohon untuk menganggap dirinya dipecat secara konstruktif. Di antara isu-isu untuk dipertimbangkan adalah sama ada: (i) kelewatan tersebut merupakan suatu penepian oleh pemohon untuk menerima perubahan terma kontraknya dengan penentang; dan (ii) sama ada kelewatan tersebut adalah munasabah dan berjustifikasi dalam keadaan kes. Mahkmah juga terpaksa mempertimbangkan sama ada pengerusi yang arif telah melakukan kesilapan bidang kuasa atas undang-undang am mengenai: (i) sokongan; dan (ii) beban bukti.

Diputuskan, membenarkan permohonan tersebut:

(1) Walaupun pada amnya keputusan Mahkamah Perusahaan yang berdasarkan inferens fakta-fakta yang ditetapkan atau tidak pertikaikan jelas sekali berada dalam bidang kuasa mahkamah tersebut dan tidak boleh dikaji semula oleh Mahkamah Tinggi disebabkan oleh s 33B Akta tersebut, keputusan tersebut masih boleh dikaji semula jika Mahkamah Perusahaan dalam memberikan satu award telah mencapai keputusan yang tidak munasabah atau mencapai keputusan yang sedemikian dengan cara yang tidak munasabah (lihat ms 428D–F); *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204, *Chan Siew Kim v Woi Fung Shen Tim Medical Store & Anor* [1978] 1 MLJ 144 dan *Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 diikut.

(2) Jika keputusan pengerusi yang arif adalah tidak munasabah atau dicapai dengan cara yang tidak munasabah dengan mengambil kira perkara yang tidak patut diambil kira atau jika beliau gagal mempertimbangkan sesuatu yang tidak patut diabaikan, ini berjumlah kepada suatu kesilapan undang-undang. Kesilapan yang sedemikian akan, dalam keadaan yang mengizinkan, membolehkan mahkamah mengeluarkan certiorari dan/atau mandamus, yang mana sesuai, meskipun terdapat fasal penyingkiran bidang kuasa dalam s 33B Akta tersebut (lihat ms 429H–430A); *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 diikut.

(3) Kesimpulan yang jelas berkenaan dengan sebab mengapa pemohon telah mengambil 22 hari untuk menulis CL4 and

bukannya lebih awal adalah untuk memastikan fakta bahawa dia dipecat secara konstruktif oleh penentang. Hanya apabila pemohon telah pasti bahawa penentang telah 'memaksanya' keluar daripada syarikat tersebut melalui tindakan mereka dan/atau ejen mereka, barulah dia menulis CL4. Seseorang yang munasabah yang memakai ujian objektif yang realistik dan bukannya yang tidak rasional akan, mungkin sekali, membuat keputusan yang sama seperti yang dibuat oleh pemohon dengan mengambil kira kedudukannya sebelum 27 September 1989 (lihat ms 433H–I).

(4) Dengan memutuskan bahawa pemohon dengan sukarelanya telah meletak jawatan disebabkan oleh kelewatannya sendiri, adalah 'tidak rasional' dan 'salah di sisi undang-undang' sebagai bertentangan dengan kekukuhan keterangan yang dikemukakan dalam permohonan ini. Kewujudan suatu kesilapan undang-undang yang begitu jelas tidak memberikan alternatif lain selain daripada mengeluarkan perintah certiorari dan mandamus (lihat ms 439A–B); *Chahaya Pemborong Sdn Bhd Sabah v Lee See Khong* [1990] 1 ILR 202, *Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1975] 2 MLJ 317 dan *Hoh Kian Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 diikut.

(5) Tidak terdapat rukun/kaedah undang-undang bahawa seseorang mesti memanggil satu atau lebih saksi-saksi bebas untuk menyokong satu fakta yang telah dibuktikan dalam maksud s 3 Akta Keterangan 1950 (lihat ms 440B–C).

(6) Oleh kerana pemohon telah membuat dakwaan bahawa dia telah diugut oleh pengurus pentadbiran dan sumber manusia untuk penentang, maka dia mempunyai beban bukti fakta tertentu itu (lihat ms 440F–H).]

Notes

For cases on error of law which goes to jurisdiction, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) para 140–148.

Cases referred to

British Aircraft Corp Ltd v Austin [1978] 1 LRR 322 (refd)

Chahaya Pemborong Sdn Bhd v Lee See Khong [1990] 1 ILR 202 (folld)

Chan Siew Kim v Woi Fung Sheng Tim Medical Store & Anor [1978] 1 MLJ 144 (folld)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia [1995] 3 MLJ 369 (folld)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd)

Lewis v Motorworld Garages Ltd [1986] ICR 157 (refd)

Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204 (folld)

Post Office v Roberts [1980] 1 LRL 347 (refd)
R v Baskerville [1916] 2 KB 658 (refd)
Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 217 (folld)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 43 (refd)
Woods v NM Car Services (Peterborough) Ltd [1981] EAT 666 (refd)
Yap Ee Kong & Anor v PP [1981] 1 MLJ 144 (refd)

Legislation referred to

Control of Rent Act 1960 s 15(1)
Evidence Act 1950 ss 3, 5, 32(1)(b), 58, 59, 60, 60(1)(b), 62, 101(1), 101(2), 102, 106, 118, 156, 157, 158
Industrial Relations Act 1967 ss 20, 33A, 33B
Rules of the High Court 1980 O 53

B Lobo (*Lobo & Associates*) for the applicant.
N Sivabalah (*Shearn Delamore & Co*) for the respondents.

Abdul Kadir Musa JC: This is an application, vide encl 7, prayers (a) and (b), for the issuance of the orders of certiorari and mandamus by Abdul Rahim bin Jemali ('the applicant') against Merlin Management Corp Sdn Bhd and Faber Group Bhd ('the respondents') under O 53 of the Rules of the High Court 1980 ('the RHC 1980'). It was made against the decision of the learned chairman of the Industrial Court in relation to the Industrial Court Award No 499/94 dated 11 November 1994 ('the award'; exh ARJ-14 at pp 186–198 of encl 3). At the hearing of this application, the applicant was represented by Mr B Lobo, while Mr Sivabalah represented the respondents.

A detailed dissection of the award clearly shows that the Industrial Court was fully satisfied, on the facts, that the respondents did constructively dismiss the applicant from the post of the Head of Marketing and Sales Department by replacing him with one En Meor H Lotfi ('En Meor') with effect from 27 September 1989 as evidenced by their letters, CL1 (ARJ-9; at p 77 of encl 3 and CL2, p 78, ibid.). In CL2, the applicant was informed and directed to be answerable to En Meor. CL1 was sent to *all* staff of the respondents except the applicant, with a carbon copy to En Meor, while CL2 was specifically addressed to the applicant with carbon copies to the chairman of the respondents' Exco and the chief financial officer of the same. In respect of CL1 and CL2, it was thus held at p 191 of encl 3 by the learned chairman that:

> The contents of CL1 and CL2 are crystal clear that the company [was] demoting the claimant (the appellant). What is there that is not clear? The letter said that the company was putting Meor (COW1) as head of marketing and sales of the company who would be responsible for the day-to-day running of the department and that the claimant as director should report to him directly. The claimant was also asked to give up his room to Meor (COW1). *Even the simplest of persons could understand this measure by the company was meant to ridicule and demote the claimant from being the head of*

the department and be replaced by Meor (COW1) who was said to be incompetent. Therefore no clarification by the claimant was necessary. (Emphasis added.)

However, having held so, the learned chairman went further to conclude that since the applicant did not react immediately to that fundamental breach committed by the respondents, but waited till 18 October 1989 to do so, the applicant was deemed to have waived the breach and agreed to vary the contract. According to him, the applicant accepted the respondents' appointment of En Meor as the applicant's replacement and did not object himself to moving out of his room to give way to En Meor (p 193 of encl 3). The learned chairman also held that, in spite of what was stated in CL4 (p 80, ibid) and the applicant's own explanation as to the cause of the 'delay', it still did not change the fact that such a 'delay' would not qualify the applicant to claim constructive dismissal in the circumstances of the case. His decision was based, inter alia, on the case of *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 43 (p 192, ibid) and *Bryn Perrins' Industrial Relations and Employment Law of UK* (p 195, ibid). The same conclusions were echoed by Mr Sivabalah who urged the court not to disturb the findings of the learned chairman.

At this juncture, it would be appropriate for me to point out that, after Mr Lobo had briefly outlined the law and the facts in relation to this application, both parties agreed that there was constructive dismissal within the legislative intention of s 20 of the Industrial Relations Act 1967 ('the Act'). Their reasons for so agreeing were identical to those found by the learned chairman. I too shared the same conclusion. As such, it will be fruitless for me to discuss the same here.

It was also agreed by both learned counsel that there was a 'delay' by the applicant in considering himself constructively dismissed by the respondents. What was in dispute was whether or not the delay: (i) amounted to a waiver, as found by the learned chairman, on the part of the applicant to accept variation of the term(s) of his contract with the respondents; or (ii) was reasonable and with justifiable ground(s) in the circumstances of the case. It was in that context they further agreed that:

(a) if the answer is in favour of (i), the application should then be dismissed with costs; but

(b) if an affirmative answer leans towards (ii) above, then the applicant should succeed in his application.

It was towards those directions that I will next endeavour to focus my reasons and findings.

The general law is that the decision of an Industrial Court based on factual inferences of established or undisputed facts falls squarely within the jurisdiction of that court and is not reviewable by High Court by virtue of a clear provision of s 33B of the Act. That section, which makes an award final and conclusive, provides as follows:

(1) Subject to this Act and the provisions of s 33A, an award, decision ... of the (Industrial) Court under this Act ... shall be final and conclusive,

> and shall not be challenged, appealed against, reviewed, quashed or called in question in any (High) Court.

Section 33A of the Act deals with any reference to the High Court on a question of law by any of the parties to proceedings before the Industrial Court which is not applicable in the present application. As such, the Federal Court, in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia* [1995] 3 MLJ 369 at p 370, fully endorsed that principle laid down by s 33B by holding that:

> (7) An application for the prerogative order of prohibition is not an appeal and neither the High Court nor the Court of Appeal is entitled to review the merits of any decision reached by the Industrial Court.

Certiorari and mandamus are two other prerogative orders mentioned by O 53 r 1 of the RHC.

However, it was argued by Mr Lobo, and conceded by Mr Sivabalah, that there were exceptions to that general rule. On the authority of *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204, he contended that such a decision could still be reviewed if the Industrial Court in making an award came to absurd conclusions or achieved the same absurdly. It was his contention that in this application, the learned chairman had falled into the trap of the case.

In *Malayan Banking Bhd*'s case at p 206, it was stated by Abdoolcader SCJ that:

> The general principle would appear to be that it will usually be proper to treat a decision-maker's tasks of fact-finding and the drawing of factual inferences from established facts as falling within the decision-maker's jurisdiction, unless the decision-maker has reached absurd results or reached results absurdly.

since according to his Lordship:

> It is now possible but no longer necessary to treat factual error as unreviewable ... .

There have always been jurisdictional grounds of review for errors occurring in the course of an inquiry or a proceeding which was validly initiated. In making the conclusion, his Lordship made reference to and adopted the conclusion he had made earlier when he was the High Court judge in Ipoh in *Chan Siew Kim v Woi Fung Shen Tim Medical Store & Anor* [1978] 1 MLJ 144.

In *Chan Siew Kim*'s case, his Lordship analysed in great depth the effect of s 15(1) of the Control of Rent Act 1960, which contained the same privative or ouster clause as that found in s 33B of the Act. Section 15(1) provides that any person aggrieved by the decision of the Rent Tribunal can appeal against that decision to the appeal board. However, the same section goes further to also provide that any decision made by the appeal board on such appeal shall be final and shall not be questioned in court. In the context of the present application, the function of the appeal board to hear any appeal was on the parallel plane as that

entrusted to the Industrial Court. In that respect, his Lordship at p 146 held that:

> The effect of this statutory provision — a privative or ouster clause contradistinctive to mere finality, ... as to its operative influence in regard to availability of certiorari and the restricted ground therefor in the case of the former — is to purportedly to take away the right to certiorari, and ... *certiorari would not however, notwithstanding the privative formula in [that section], be precluded if there is in fact a manifest defect of jurisdiction in the authority that made the decision* ... . (Emphasis added.)

In my humble and considered opinion, that 'manifest defect of jurisdiction in the authority' in *Chan Siew Kim*'s case can therefore be equated to the learned chairman 'making absurd conclusions of factual inferences or concluded absurdly of the same' as contended by Mr Lobo. If I may be permitted, the situation is the same as that of a student of mathematics producing a 'correct answer' using a wrong method or formula, or getting 'a wrong answer by applying a right method or formula'; neither answer can be said to be correct in the mathematical sense. Therefore, the power(s) or jurisdiction given to the Industrial Court under the Act does not warrant the learned chairman to commit an error in law in making the award. What can be construed as 'an error of law' was well explained in the case of *Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317.

In *Sykt Kenderaan Melayu*'s case, Gopal Sri Ram JCA, at p 342H–I, thus explained:

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker [or the learned chairman] asks himself or takes into account irrelevant considerations or omit to take into account relevant considerations ... or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of general law.
>
> Since *an inferior tribunal [in this application, the Industrial Court] has no jurisdiction to make an error of law, its decision will not be immunized from judicial review by an ouster clause [such as that found in s 33B of the Act] however widely drafted.* (Emphasis added; words within brackets added.)

This may have led to its decision being so perverse and devoid of any plausible justification that no reasonable body of persons could have reached it. If such a situation can be proved, then s 33B of the Act will not preclude the issuance of a certiorari.

In summary, Mr Lobo submitted that if the decision of the learned chairman was an absurd one or reached absurdly by taking into consideration what he should have omitted or failing to consider those that should not be ignored, that, in law, would be tantamount to him committing an error in law. Such an error would therefore, where circumstances justify, enable this court to issue certiorari and/or mandamus, as the case may be, notwithstanding the existence of the privative or ouster clause found in s 33B of the Act. In that respect, I fully agree with Mr Lobo. It is most gratifying to note at this juncture that even Mr Sivabalah, in

essence, shared the same view. They both agreed, and so do I, that the reliance of the learned chairman on *Wong Chee Hong*'s case to conclude that there was a constructive dismissal in the present application, was not only accurate but also a correct one. As such, I need not go further to justify the same.

However, what was disputed by them was 'whether or not the conduct of the applicant subsequent to the issuance of CL1 and CL2, in law and in fact, should be construed as a waiver by him to being constructively dismissed by the respondents'; this is the next core consideration.

On the facts of this application, it was strongly argued by Mr Lobo that it was wrong for the learned chairman to have concluded that the applicant had waived his right(s) to claim constructive dismissal by writing CL3 dated 28 September 1989 after receiving CL2 on 27 September 1989 from one Raja Mohar bin Raja Zainal Abidin ('Raja Mohar'), the manager of human resources and administration for the respondents. The mistake was further compounded when the learned chairman concluded that having waived that right, the applicant was deemed to have agreed to vary the contract by showing no protest to the constructive dismissal, but instead waited until 18 October 1989 to resign from the employment of the respondents in writing CL4 (pp 80 and 81 of encl 3). That, according to Mr Lobo, can be classified as falling within the principles laid down in those cases stated earlier above, to be 'absurd results' or the conclusions 'reached absurdly', having regard to all the circumstances of the case which propelled his client to react in the manner he did which culminated in him writing CL4.

Mr Sivabalah, on the other hand, defended strongly the decision of the learned chairman for the same reasons as those advanced by the latter. In gist, the learned chairman concluded that, in order for the applicant to reap the benefit(s) of constructive dismissal, the applicant should not delay in reacting to it as he did in this case.

With the greatest of respect to both the learned chairman and Mr Sivabalah, I could not accept their reasons as being justifiable having regard to all the facts of this application. Instead, I fully agreed with the contentions of Mr Lobo for the reasons given below.

Upon close analysis of the award, there were a number of grounds that could reasonably be inferred as to why the learned chairman came to such 'an absurd result' or 'reached the same absurdly'. Amongst them, were:

(i) the conclusions drawn from CL1 and CL2;

(ii) the effect of the applicant writing CL3;

(iii) the conclusion that the period between 27 September 1989 and 18 October 1989 was too long a delay for the applicant to eventually write CL4;

(iv) wrong or insufficient evaluation of the evidence of witnesses especially the applicant and En Meor;

(v) the learned chairman's perception of the need for corroboration in proceedings which are civil in nature; and

(vi) his perception of the effect and impact of the applicant receiving CL9 on 16 October 1989.

It is my humble and considered opinion that each one of those reasons could, by itself, give the court the necessary substratum to issue certiorari and/or mandamus. I will next endeavour to discuss each one of those reasons in greater depth.

Both CL1 and CL2 were dated 27 September 1989. They were written by Raja Mohar in his official capacity as the manager of human resources and administration for the respondents. The purpose of sending those letters was to convey the decision of the respondents' Exco which met on the same day as the date of CL1 and CL2. Amongst the Exco decision was the replacement of the applicant with En Meor as the head of marketing and sales of the respondents with effect from also 27 September 1989; that is to say, with immediate effect.

CL1 was sent to all relevant personnel including all staff of the respondents, except the applicant himself. It was also carbon copied to En Meor. CL2 was addressed and sent to the applicant with carbon copies to: (i) the chairman and the Exco; and (ii) to the chief financial officer for the respondents. By CL2, the applicant was also directed to vacate his room to give way to En Meor, and was advised to continue to co-operate fully with the latter.

Viewing the contents of CL1 and CL2 objectively, it can reasonably and justifiably be inferred that the crux of those letters, though clearly intended 'to demote' the applicant as on 27 September 1989, still required him to continue to co-operate with En Meor fully. In such a situation, would it not be justified for the applicant to clarify the true position he was placed in by writing CL3? My opinion was, and is, he was fully justified to do so without the benefit of the minutes of the relevant Exco meeting nor the explanation of why he should be replaced by En Meor. Was there something wrong in him carrying out his duties as head of marketing and sales before 27 September 1989 or was it a genuine need of reorganization within the company affecting his responsibilities as the very title of CL2 seemed to suggest.

Without the benefit of the actual minutes of the Exco meeting of 27 September 1989, it would not only be reasonable but practically logical for the applicant to write CL3 for the reasons as explained by him at the hearing before the learned chairman. I am quite optimistic that if the learned chairman did not omit to view and evaluate certain obvious facts that could be drawn from CL1, CL2 and CL3, he would have, in all probability, come to a different conclusion which would be more consistent with the explanation given by the applicant before the learned chairman. What then were those obvious facts that he had omitted to take into consideration which he ought to have, in order to come to a more practical and reasonable conclusion acceptable by a body of reasonable persons?

It can be seen clearly from the 'subject' or 'title' of CL2 and CL3, it was styled as 'Re: Reorganization' and 'Subject: Responsibilities and Reorganization' respectively. CL1, on the other hand, only states 'marketing and sales dept ...' and it served to inform all relevant personnel including all staff of the respondents, except the applicant himself, of the immediate substitution of the applicant by En Meor. It also directed all those concerned to liaise directly with En Meor and to '... provide the necessary assistance and support in ensuring the betterment of this organization'. The same direction and/or advice can be found in CL2. In both CL1 and CL2, neither the relevant Exco minutes nor any explanation was given as to why there was a need for such a change. In such a situation, it would be perfectly logical for the applicant to write CL3 to En Meor to find out what his responsibilities were in view of what CL2 classified, by its very title, as 'reorganization' and in compliance with the advice stated in the last paragraph of CL2.

In the said last paragraph of CL2, it states:

> I have no doubt you will co-operate fully with En Meor for the profitable operations of the marketing and sales department.

Thus in CL3, the applicant started his letter to En Meor as follows:

> I have been advised by (Raja Mohar) to seek your instructions on the above matter.

'The above matter' he was referring to was in relation to his exact 'responsibilities' and 'reorganization of the marketing and sales department' as reflected by the second paragraph of CL3. In para 3 of CL3, the applicant stated his reasons for doing so as follows:

> ... [to] enable me to not only optimize resources and contribute most effectively to the department but also to ensure greater productivity and avoid duplication of functions.

After stating what was quoted above, he ended CL3 by asking En Meor where he would then be relocated within the department in relation to the 'reorganization' of the marketing and sales department as projected by CL2. It is important to note that nowhere did the applicant say that he did not object to being 'demoted', or that he had accepted the variation of his contract of employment with the respondents as found by the learned chairman. It is also a fact that CL3 was never replied to. A carbon copy of CL3 was also sent to Raja Mohar. Applying those facts objectively, it is to be expected of any reasonable body of persons to conclude that CL3 was written for the purposes of what were contained therein and nothing more. It was so written, in the absence of any cogent evidence to the contrary, in obedience to the instructions and/or advice of his superior, Raja Mohar, and not as what was concluded by the learned chairman. This can be seen by the evidence of the applicant himself during the proceedings before the learned chairman.

At p 13 of encl 5, in answer to learned counsel for the respondents during cross-examination, the applicant ('CLW1'), in relation to CL3, said:

(Referred to CL3).

I agree I wrote this letter and addressed it to En Meor, head of marketing and sales. *I do not agree that by this letter I recognized Meor as head of marketing and sales. I wrote to (him as such) in view of a previous letter and also on the advice of the human resources manager.* (Emphasis added.)

'The previous letter' referred thereto was CL2. The 'advice' mentioned thereto can easily be extracted also from CL2, and that was 'to co-operate fully with En Meor for the profitable operation' which was obediently responded to by the applicant by writing CL3 to En Meor for the reasons already discussed above. I failed to find any evidence suggesting that by writing CL3, the applicant had waived his right(s) with regard to such dismissal nor agreed to vary his contract with the respondents as found by the learned chairman. In that aspect, and with the greatest of respect to the learned chairman, he was being 'irrational' in coming to that 'absurd conclusion' or 'arrived at his findings absurdly'. However, since CL3 was not replied to, compounded by the events that took place between 28 September 1989 and 17 October 1989, the applicant had no other alternative but was compelled to write CL4 and treat himself as being constructively dismissed as from 18 October 1989 as reflected by CL4.

CL4 was written in simple language which clearly explained why the applicant had to consider himself constructively dismissed by the respondents. In para 1, he referred to the carbon copy of CL3 which he sent to Raja Mohar, and which was not responded to either by En Meor or Raja Mohar or any other proper person in authority. Paragraph 2 of the same pointed out in no uncertain terms that he was told to resign or would face being charged by both Raja Mohar and En Meor. For those reasons, it was only by 17 October 1989 that the applicant was convinced that the purpose of writing CL2 was to force him to leave his employment with the respondents. Thus, having entertained that fact, he had no other alternative but to consider himself constructively dismissed as on 18 October 1989, the very date of CL4. In so doing, he made it clear in the last paragraph of CL4 that he was leaving 'under protest and without prejudice' to his right(s) to claim constructive dismissal.

The applicant was strenuously cross-examined by learned counsel for the respondents as evidenced at pp 11–21 of encl 5. In spite of that, I found that he was consistent with his reasons as to why he wrote CL4. The irresistible conclusion that I could infer as to why it took him 22 days (between 27 September 1989 to 18 October 1989) to write CL4 and not earlier was to make certain for a fact that he was being constructively dismissed by the respondents, and not for reorganization of the marketing and sales department as portrayed by the very title of CL2 coupled with the direction(s) and/or advice of Raja Mohar thereto. It was only when the applicant was certain that the respondents, by writing CL2 together with the events as stated in para 2 of CL4, that it was crystal clear to him that the respondents were 'forcing' him out of the company by their or their agents' conduct. Any reasonable man applying a realistic and not irrational objective test would, in all probability, have come to the same decision as the applicant, having regard to his position before 27 September 1989. The applicant was, until 26 September 1989, not just a mere employee of the respondents, but was holding a very responsible

post as head of marketing and sales. I would venture further to say that what he did between 28 September 1989 and 18 October 1989 demonstrated the qualities of a responsible executive who would not take anything for granted until he was very sure that what he did was what the respondents wanted him to do exactly. That was precisely what he did by writing CL4, and not as what the learned chairman had concluded. What I have just inferred is well supported by the applicant's own testimony at p 20 of encl 5, which could not be rebutted by the respondents.

For easy reference and perusal, the applicant (CLW1) at p 20 of encl 5 said:

> (Referred to CL3).
>
> I knew my duties as director of marketing and sales and also my function *but with the new set-up I did not know.*
>
> I am not sure who prepared the organization chart for the various departments in the company. Normally, the job description of executives come from the human resources department.
>
> Encik Meor did not speak to me when he received CL3. I deny that En Meor told me to get it from the human resources department. (Emphasis added.)

A number of vital factual inferences can be extracted from the above quotation. They are, inter alia:

(i) upon and after receiving CL2, the applicant did not know the 'new set-up' of the company;

(ii) that job description of executives were handed down to the executives by the human resources department; and

(iii) that En Meor did not tell the applicant to obtain the necessary information he wanted from the human resources department.

All what he had said as quoted above were well supported by evidence introduced at the proceedings before the learned chairman. However, and with the greatest of respect to the learned chairman, such evidence was either not considered or not given due consideration as they ought to have been given that, in my considered opinion, led him to such unsustainable conclusions.

Firstly, the 'new set-up' referred to by the applicant was clearly connected to the very title of CL2 as shown earlier. That piece of evidence was not rebutted by the respondents. It must have been that because of that the applicant in para 2 of CL3 wrote:

> Please advise me of ... the new organization chart of the department.

to En Meor as advised by Raja Mohar in CL2. Thus, to that extent the applicant's credit was not tainted with any doubt at all.

Secondly, what he said about the job description of executives coming from the human resources department must be true since the same evidence was adduced by the respondent through En Meor at p 32 of encl 5. According to En Meor, he did not reply to CL3 because he was not in a position to do so. At that page, he said:

(Referred to CL3).

I received this letter from the claimant (the applicant). The manager of human resources has the duty to prepare organization charts and job descriptions (of executives). When I received this letter I referred it to the human resources manager.

If one were to look at CL2, it clearly states that the applicant was asked to co-operate fully with En Meor. It would therefore be perfectly logical for him to write to En Meor vide CL3 asking him for the new organization chart and his responsibilities; hence the title of his letter was thus styled 'Responsibilities and Reorganization'. Again, this piece of evidence, even though it clearly established the credibility of the applicant, was never considered by the learned chairman at all.

Thirdly, nowhere throughout the evidence of En Meor did he rebut the applicant's testimony as stated in (iii) above. This evidence too, was not taken into consideration by the learned chairman.

Not taking into consideration that which should have been taken, in law, amounted to committing an error of law for want of jurisdiction. Such non-consideration by the learned chairman would have given me sufficient platform to issue certiorari and mandamus applied for.

Be that as it may, the learned chairman however, on the basis of the authority of *Bryn's Perrins' Industrial Relations and Employment Law of United Kingdom*, quoted and relied on by him as shown at pp 195 and 196 of encl 3, went further by holding that by waiting 'too long' till 18 October 1989 to leave the company, the applicant's act of writing CL4 cannot be effectively construed as acting in direct response to the constructive dismissal, but had decided to resign from the service of the respondents himself. Again, with the greatest of respect to the learned chairman, such a conclusion demonstrated a painting of a clear picture of what was considered in *Malayan Banking Bhd* as a conclusion arrived at absurdly. It was so 'clearly perverse and devoid of plausible justification that no reasonable body of persons could have reached such a decision' having regard to all the circumstances of this application. What were those circumstances that led him to arrive at such a 'perverse and unjustifiable' conclusion?

Firstly, it was clearly demonstrated in detail that he was wrong to conclude that by writing CL3, the applicant was waiving his right(s) to claim appropriate remedy or remedies for constructive dismissal and agreed to vary his contract of employment with the respondents. Not knowing, as discussed earlier, why En Meor was employed to replace him, it would only be natural for the applicant to carry on some fact-finding mission. That mission started with the writing of CL3, but CL3 was not replied to.

Since CL3 was not replied to, the applicant himself must have 'investigated' to search for the true reason why CL2 was sent to him and CL3 was not replied to. What he gathered, in the course of his investigation, he termed as the 'sum total of the events' leading him to write CL4. What were those events that were explained by the applicant during cross-examination during the proceedings before the learned chairman himself?

For the reasons quoted earlier, he totally rejected the applicant's explanation as to what the latter meant by the words 'sum total' (see pp 196–197 of encl (3)). Can such a conclusion be justified from the facts of this case? My view is that, certainly not. Why?

During cross-examination at p 11 of encl 5, the evidence recorded was as follows:

> (Referred to CL4).
>
> I was forced out. I did not walk away. *It was not just the reason stated in para 2 of CL4 but it was a sum total.* When I wrote this letter I gave the reason as stated in para 2 of CL4. (Emphasis added.)

Then at p 19 of encl 5, the applicant further said:

> ... deny that no such thing happened, ie that *Raja Mohar threatened that I would be charged and dismissed if I did not resign.* Encik Meor also made the same threat.
>
> On 14 October 1989 I met Raja Mohar and he threatened that if I did not resign he would have me charged and dismissed. I asked him why but he could not give me an answer.
>
> Meor came to see me and the same thing was said. I asked him why and I was not given an answer.
>
> *I did not know the reason why they threatened me.* (Emphasis added.)

The 'charge' was not clarified. What I could infer from CL9 (p 94 of encl 3) is that, it must have been due to the applicant selling low room rates to travel agents. However, according to En Meor himself (at p 34 of encl 5), and I quote:

> To sell rooms at low rates may or may not be a misconduct depending on the season and occupying rate.

There was no evidence led by the respondents including CL9 to suggest that the applicant was selling low room rates which can be construed as an act of misconduct which justified the respondents demoting him as what has happened in this case. As such, why then the necessity of Raja Mohar and En Meor to threaten the applicant with such threats? Of course, there was a clear denial by En Meor about him making those threats. If that was true, then why did he refuse to comment on such a serious allegation made against him by the applicant in CL4 (pp 37 and 39, ibid)? My answer to it is that, there was some element of truth in what the applicant had said. This was never at all considered by the learned chairman. If that was done, yet he refused to accept it, then no one can say that he had omitted to consider what he ought to have taken into consideration.

Other than En Meor, the other person who can substantially negate the applicant's serious allegation would be Raja Mohar. He was not called. Since CL4 was introduced by the respondents by omitting to call Raja Mohar for that purpose, the learned chairman should have taken such allegation by Raja Mohar to be true and accepted the applicant's explanation why he wrote CL4 only on 18 October 1989, and not earlier based on his explanation of what he meant by the words 'sum total'.

A The 'sum total' referred to by the learned chairman and explained by the applicant can be found at p 21 of encl 5, which also clearly explained why he wrote CL4 only on 18 October 1989. When CL4 was referred to him, he said:

> What I meant by sum total is that on 14 October I was informed by the
B human resources manager to resign. On 17 October, I was informed by En Meor to resign also. In between 14 and 17 October, I mentioned that I received the Exco minutes (CL9) on 16 October. This is what I meant the sum total. As such I wrote in CL4 that it was now clear that the company wanted me out. *It was not clear to me prior to writing this CL4.* (Emphasis added.)

C What he meant by 'it was now clear to me', can be extracted at p 24, ibid. For convenience and easy perusal, he explained as follows:

> What I meant by '*it was now clear to me*' is because of a number of incidents.
>
> (1) My memo of 28 September 1989, CL3, not replied;
>
> D (2) On 14 October 1989, I was informed as mentioned in para 2 of CL4. That was confirmed by En Meor about the charge and dismissal on 17 October 1989. These incidents made it clear to me that the company wanted to drive me out.
>
> (Referred to MM8) (p 142, encl 3). MM8 dated 19 October 1989, is a reply to CL4. There is no mention denying the fact that I was threatened
E as mentioned in CL4. The threat was that if I did not resign I would be charged and dismissed.

If CL4 can be replied a day after CL4 was sent to Raja Mohar, the question is: why was CL3 not replied with the same promptness or at all?.

MM8 made no reference at all to rebut the serious allegations
F contained in CL4, but instead treated the writing of CL4 as an official notification of resignation by the applicant in breach of his contract of employment with the respondents. The question is: Who decides who committed the breach when the applicant was completely in the dark as to why he was demoted as per the intention of CL2, and CL3 not replied to? From the facts of the case, clearly it was the respondents who were in
G breach which caused the applicant to write CL4. At para 5 of MM8, the applicant was clearly again threatened with legal action if he did not hand over all the company properties in his possession, including the company's car JAY 5636, by 24 October 1989. The applicant promptly complied with that request on 27 October 1989, but stressed that he did so 'under protest
H and without prejudice' to his rights to claim constructive dismissal against the respondents.

From the contents of MM8 and CL10, the irresistible conclusions that could be inferred are, inter alia:

I (1) the threat of wanting the applicant to resign became more apparent which made the retroactive intention of writing CL2 more obvious that justified the applicant to write CL4 based on the 'sum total of the events' between 27 September 1989 and 17 December 1989; and

(2) in both CL4 and CL10, the applicant categorically stated and stressed that he did what had to do 'under protest and without prejudice to his rights to claim' constructive dismissal.

From the above discussion, it is my considered opinion that the total rejection by the learned chairman of the applicant's explanation as to what he meant by 'sum total' of the events leading him to write CL4 was obviously irrational and was against the weight of evidence. It was an error of law for him to do so within the principle laid down in *Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 at p 342. *Sykt Kenderaan Melayu*'s case was endorsed by the case of *Hoh Kian Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369. It was wrong because the learned chairman failed to take into consideration certain facts or took into account those which were irrelevant since, on the facts, the applicant was clear on the true intention of the respondents writing CL2 only on 17 October 1989. Hence to write CL4 the next day (18 October 1989) was fully justified.

Putting aside how the 'total sum' should be viewed in this case, applying it objectively to the facts of this case, the learned chairman should have asked himself the question: Was 22 days (that is from 27 September 1989 to 18 October 1989) 'too long' within the context of the very authority he relied on? The answer should have been in the negative. I am supported by the case of *Chahaya Pemborong Sdn Bhd Sabah v Lee See Khong* [1990] 1 ILR 202.

In *Chahaya*'s case, the claimant's benefits attached to his position were reduced by the respondent's company vide their 'Revised Letter of Appointment' dated 1 December 1987 without consulting him at all. As such, he deemed it that he was dismissed as on 1 December 1987, but remained until 31 December 1987 in order to enable him to inform the company in writing that the revised terms were not acceptable to him. On 4 January 1988, he received a letter dated 30 December 1987 terminating his service with the company. In between 1–31 December 1987, he tried to settle the matter with the company, but all his efforts were not fruitful. During that period, he even continued to work on those reduced terms. On those facts, it was held at p 203, ibid, that:

> [2] The claimant was, in law, dismissed from his employment by the company on 1 December 1987. The claimant remaining in employment until the end of December 1987 does not amount to (him) treating the contract as subsisting. The explanation given by (him) for doing so and the various letters sent by him to the company satisfy the court as not being the conduct of one wanting to treat the contract as subsisting.

In substance, the facts in *Chahaya*'s case are very much similar to those presented in this application. In the present case, CL2 and CL4 can be equated to the letters of 1 December 1987 and 31 December 1987 respectively in *Chahaya*'s case. In both instances, except in forms, both the claimant and the applicant were placed in their respective 'relegated' positions; the latter in the form of 'position and responsibilities', whilst the former in terms of fringe benefits. In both cases, the applicant and the

A claimant remained in their respective office until they could justifiably treat themselves as being constructively dismissed. In *Chahaya*'s case, the 'waiting period' was 31 days, whilst in the present case it was 22 days. If the test is whether '22 days' was 'too long', certainly the learned chairman was rather 'irrational' to hold as such since the 'waiting period' in *Chahaya*'s case was even longer. Thus to hold that by writing CL4, the applicant voluntarily resigned due to his own delay would certainly be 'irrational' and 'wrong in law' as being against the weight of evidence adduced in this application. The existence of such a clear error of law left me with no alternative but to issue the orders of certiorari and mandamus accordingly.

However, in order not to be branded as being 'irrational' myself in coming to the above conclusion, I still have to determine whether or not, in dismissing the applicant's claim, the learned chairman had committed jurisdictional error on the general law of:

(i) corroboration;

(ii) the burden of proof; and

(iii) the credibility of witnesses, in particular En Meor and the applicant

as expressed by him at pp 196 and 197 of encl 3. In this context, the words 'sum total' as used by the applicant can aptly be equated in law to 'circumstantial evidence' that propelled and compelled him to write CL4 for the reasons stated earlier.

Without going into a micro-discussion of what in law is 'circumstantial evidence', it can safely be summarized as a body of evidence which, when considered in isolation will not paint any meaningful picture intended by the painter to portray, but viewing them in totality will clearly and undisputably project the very picture expected of him by any reasonable man to produce. Anything short of that will fail that test. In making such an assessment, it must be viewed objectively. In the present application, I held that the applicant was able to produce that body of evidence which firmly established, as of fact, that he had no alternative in the circumstances but to justifiably leave the employment of the respondents as on 18 October 1989 by writing CL4. It has been pointed out earlier that each and every strand of the relevant piece of evidence produced by the applicant that made up the scenario of events between 27 September 1989 and 18 October 1989 was neither rebutted nor could be so rebutted by the respondents. On the contrary, certain evidence either confirmed or enhanced the applicant's explanation as to why he wrote CL4 only on 18 October 1989. One such example was in relation to the threats found in CL4.

It was not disputed that CL4 was introduced in evidence by the respondents. The above-mentioned threats were therefore very relevant to the issue as to the truth of the existence or non-existence of such threat under s 5 of the Evidence Act 1950 ('the EA'). To the applicant, that piece of evidence corroborated what he had said during the proceedings before the learned chairman. To the respondents, if there were no such threats, then the applicant's evidence or his testimony, thus his credibility to that effect, can therefore and rightly be construed as being 'disproved' within the meaning of s 3 of the EA. The question is: did the learned chairman

consider that adequately as required of him; and if he did, did he consider it rightly? My answer to that is, he failed to do so. Why? A

Without repeating the details, it can be recollected that the applicant's testimony remained unrebutted by the respondents as to the threats made by both Raja Mohar and En Meor on 14 October 1989 and 17 October 1989 respectively. Why then, as held by the learned chairman, was there B the need for the applicant to call Raja Mohar to give evidence to corroborate that statement of the applicant which stood firmly unrebutted? CL4 was not introduced in evidence by the applicant. There is no rule of law that requires a person to call one or more independent witness(es) to corroborate a fact which has been 'proved' within the meaning of s 3 of the EA. With respect, that was, by inference, exactly what the learned chairman expected C the applicant to do with regard to his dismissal of the applicant's claim when he said:

> The 'sum total' mentioned by the claimant ... has not been corroborated. (Raja Mohar) has not been called to confirm the above. Therefore, the claimant's claim ... has not been proved. With respect to him, that was a D clear misapprehension by the learned chairman as to the law of evidence in respect of 'burden of proof' and the need for corroboration in civil cases for the reasons stated below.

Section 101 of the EA provides:

> (1) Whoever desires any court to give judgment as to any legal right ... E dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove any fact, it is said that the burden of proof lies on that person.

Where were the 'assertions' of the existence or non-existence of the relevant F facts in this application? This the learned chairman must first identify in order to come to a correct decision.

Clearly, from the facts of this application, it was a firm assertion on the part of the applicant that he was threatened by Raja Mohar that he if did not resign, he would be charged. On the other hand, the respondents G said otherwise. Thus by the interaction of ss 101 and 102 of the EA, it would be the duty of the applicant to prove that Raja Mohar did in actual fact, on the balance of probabilities, threaten him as such, while it would be incumbent on the respondents' part to prove otherwise. This is further supported by ss 103 and 106 of the EA.

H

Section 106 states:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Section 103 requires that such a burden lies on that person who wishes the court to believe in its existence, unless it is provided by any law otherwise. I In an appropriate situation, any party to a proceeding who asserts a particular fact but does not at all attempt to introduce any evidence to that effect could construe that, by virtue of s 114(g) of the EA, if such evidence was produced it would be unfavourable to him. How and to what extent

such evidence is to be introduced are answered by ss 32(1)(b), 59, 60, 61, 62, 58, 118, 156, 157 and 158 of the EA.

In the case of the applicant, he can elect to prove the allegation either orally or by way of documentary evidence. In this application, he did it by the former method. He was allowed to do so as s 59 of the EA provides:

> All facts, except the contents of documents, may be proved in evidence.

Since the applicant was personally threatened by Raja Mohar, s 60(1)(b) of the EA declares that:

> 60 (1) Oral evidence shall in all cases whatever be direct, that is to say —
>
> ...
>
> (b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

It has been discussed in detail earlier on that those threats were clearly established by the applicant, and on the facts of this application, it could be equally inferred that it could not be rebutted by the respondents. As such, that fact was cleared 'proved' within the meaning of s 3 of the EA and should not be rejected by the learned chairman.

The above piece of evidence was further enhanced by the presence of a similar statement of fact in CL4 introduced in evidence by the respondents themselves which requires no proof by the applicant by virtue of s 58 of the EA. Section 58 provides:

> 58 (1) No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing ...:

Since CL4 was introduced by the respondents and not objected to by the applicant's counsel, the truth as to the existence of such a statement in so far as CL4 is concerned need not therefore be proved by the applicant. Instead, the existence of such a statement in CL4 can be construed as corroboration of the applicant's own testimony in that respect under s 157 of the EA. It was in the nature of his former statement in writing in relation to the same fact which, by virtue of s 58, need not be proved. It will be left to the respondents to contradict the existence of such threats having regard that CL4 was their document under s 158 of the EA by calling Raja Mohar to do so.

Section 158 of the EA stipulates:

> Whenever any statement relevant under ss 32 or 33 is proved, all matters may be proved ... in order *to contradict ... the credit of the person* by whom it was made, which might have been proved if that person had been called as a witness and denied upon cross-examination the truth of the matter suggested. (Emphasis added.)

'That person' referred thereto is none other than Raja Mohar himself. Such statement of the allegation certainly falls within the ambit of s 32(1)(b) of the EA as a statement made by him expressing the intention of the respondents to the applicant. He is certainly a competent witness under s 118 of the EA. Thus, in the circumstances of this application, by not calling Raja Mohar, the respondents had deprived the applicant the opportunity to cross-examine him if he were to deny such allegations. Be

that as it may, it certainly deprived the Industrial Court the opportunity to evaluate the credibility of the applicant in that respect. If it was not able to do so, it will only go to support my conclusion that the learned chairman was certainly wrong in law to have completely rejected the testimony of the applicant on the grounds that, inter alia, it had not been corroborated. With respect to him, it is trite law that, even in criminal matters, the need for corroboration is not the requirement of the rule of law but a rule of prudence, and that also only in certain cases (see *R v Baskerville* [1916] 2 KB 658 and *Yap Ee Kong & Anor v PP* [1981] 1 MLJ 144).

The other important piece of evidence which was wrongly inferred by the learned chairman can be found at p 197 of encl 3, when he said the following:

> As regards the claimant's claim that he received CL9 on 16 October 1989 the relevant content is nothing new to him as it has been stated in CL1 and CL2 which were received by the claimant on 27 September 1989.

There are a number of flaws in that observation of his which must have resulted in such an 'irrational' conclusion as shown below.

It has been clearly demonstrated earlier that CL1 was not or ever sent to the applicant. In both CL1 and CL2, it was silent whether a copy of the minutes of the relevant CL9 was attached to the respective letters. From the contents of both CL1 and CL2, there was no explanation as to why the applicant had to be displaced by En Meor. With all those undisputed and/or rebutted facts, I could not find any justifiable platform for the learned chairman to even draw such an inference, let alone to make such an irrational conclusion. The only evidence to that effect came from the applicant himself when he was cross-examined by the respondents' counsel.

During cross-examination at p 12 of encl 5 as to whether or not he was entitled to receive CL9, his answer was:

> ... I am *not* entitled to receive a copy of CL9.

That evidence was not rebutted at all. If so, what was the learned chairman's justification in concluding that 'the relevant content' of CL9 was stated in CL1 and CL2? I could not find any.

How the applicant came to know about CL9 was not in the manner as concluded by the learned chairman, but by what can be extracted from his answer at the same page of encl 5 when he said:

> Somebody put this in my mail box. I am not sure if CL9 is the approved minutes. I received this on 16 October 1989.

and reaffirmed the same in his re-examination (p 21, para (B), ibid) when he explained what he meant by the expression 'sum total'. It was the effect of that 'sum total' that compelled him to write CL4. This piece of evidence was neither rebutted nor could it be rebutted by the respondents which, by the requirement of s 3 of the EA, was therefore 'proved'.

Admittedly, the applicant could have left on 16 October 1989, but it could also be inferred from the facts that he still wanted to make doubly sure that it was the sole intention of the respondents to have him

A constructively dismissed, and not a genuine reorganization as painted by CL2 to which his CL3 was never answered. For that purpose, he himself must have endeavoured to meet En Meor for clarification. His endurance paid off when he had a short encounter with En Meor on 17 October 1989. Instead of getting a clarification from him, the applicant was again B threatened with the same threats by En Meor on that day. Of course, En Meor categorically denied that.

It would appear to me that the learned chairman accepted En Meor's evidence in preference to that of the applicant's. In normal cases, such finding of fact by the inferior tribunal should not be disturbed by this court. However, if one were to evaluate that denial against the backdrop of C all the facts of this application, any reasonable person would have concluded that the applicant's evidence to that effect should be preferred and accepted as against that of En Meor's. I said so because there was no evidence to suggest that the applicant was an incompetent employee as opposed to En Meor. Clearly, from the evidence of En Abdul Halim bin Ihsan D (CLW2) it could not be denied by the respondents that En Meor was not a competent employee of the respondents (p 29, para (D) and (F)). According to CLW2, En Meor who was working under him (ibid, para (d)) prior to the former leaving the employment of the respondents in June 1989 (p 28, encl 5), para (c)), never had his contract extended because he was not competent. CLW2 made no mention at all as to the competency E of the applicant. As such, the only reason for wanting the applicant to be 'demoted', and working under such an 'incompetent' En Meor was to make the applicant 'uncomfortable' with the Exco decision through CL2, and hope that he would leave the company on his own; thus covering up the intended constructive dismissal by the respondents by portraying that F it was the applicant who resigned from the company by writing CL4.

However, that gamble did not pay off. The applicant, being a competent and responsible employee of the respondents, other than the alleged selling of low room rates, did what he has done to find out the truth of the intention of CL2 and why his CL3 was not replied. Upon searching for that, he was threatened by En Meor on 17 October 1989 as explained G earlier. That piece of evidence was loaded with justifiable credence compared to just the bare denial by En Meor. Perhaps, and in all probability, if the learned chairman were to scrutinize those facts in the like manner, he would not have come to that conclusion.

From the above analysis, the cumulative effect of what the respondents H did, either openly or by inference, would have fitted squarely into what the applicant termed as 'sum total' of the events that took place between 27 September 1989 and 17 October 1989 which left him with no alternative but to write CL4 on 18 October 1989 for the reasons stated thereto. That 'sum total' of events is what in law amounts to 'circumstantial evidence' I within the context of this application. The act of the respondents in passing the resolution as per CL9 referred to earlier, without even consulting the applicant or letting him know through CL2, together with not replying the applicant's CL3, certainly would seriously damage the relationship

and trust between the applicant and the respondents which is prohibited by the Act.

In *Woods v WM Car Services (Peterborough) Ltd* [1981] EAT 666, at p 667, it was held that:

> ... the question whether or not the employers' conduct amounted to a repudiatory breach was a mixed question of fact and law for the Industrial Tribunal to decide ...

How it should therefore be decided was explained at p 670 as:

> ... it is clearly established that there is implied in a contract of employment a term that *the employers will not, without reasonable and proper cause, conduct themselves in the manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.* (Emphasis added.)

That principle was fully endorsed by the Court of Appeal in *Lewis v Motorworld Garages Ltd* [1986] ICR 157 at p 167, para (c).

What happened between 27 September 1989 and 17 October 1989 leading the applicant to write CL4, on the facts of this application, must therefore be viewed by the learned chairman as a whole to determine whether or not its effect was such that the applicant could not be expected to put up with it (see *British Aircraft Corp Ltd v Austin* [1978] 1 LRR 322). It should not be viewed in isolation but assessed from its cumulative impact (see *Post Office v Roberts* [1980] 1 LRL 347). If that was done, the only irresistible inference that could be drawn from those facts was none other than to create a situation which the applicant could not be expected to put up with but to treat himself as being constructively dismissed as on 18 October 1989.

On the premise above, I was left with no alternative but to allow the applicant's application for the orders of certiorari and mandamus. Since there was no dispute at all that there was constructive dismissal, I am of the opinion it would be a waste of time for me to remit the whole case back to the Industrial Court to determine whether or not, in fact, there was a constructive dismissal all over again. On that score, I agree with Mr Lobo that that part of the award which was held by the learned chairman that there was inordinate delay on the part of the applicant amounted to him waiving his rights to claim constructive dismissal but instead resigned himself voluntarily from the employment of the respondents be therefore quashed; and so ordered accordingly by way of certiorari. Though I am of the view that this court could have decided what is or are the remedy or remedies available to the applicant in the circumstances of this case (see *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481), it would be most appropriate for the Industrial Court to do so. As such, I accordingly made such an order. Lastly, I ordered the respondents to pay costs.

Application allowed.

Reported by Lew Chee Seong